

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

BURTT DEVELOPMENT CO., INC.,)	
Appellant)	
v.)	No. 03-27
)	
NEEDHAM BOARD OF APPEALS,)	
Appellee)	

**RULING ON MOTION TO INTERVENE
and
DECISION ON STIPULATION**

This appeal concerns affordable housing proposed on a 5.5-acre lot located between Greendale Avenue and state Route 128 in Needham. In the summer of 2002, the developer, Burt Development Co., Inc., applied to the Needham Board of Appeals for a comprehensive permit under G.L. c. 40B, §20-23 to build 36 units of housing, 9 of which would be affordable to low or moderate income households. Exh. 1, pp. 15-16. The housing would be built under the MassHousing Housing Starts program. Exh. 1, p. 1. After ten public hearing sessions over a fourteen-month period, the Board denied the permit by a two-to-one vote in a decision filed with the town clerk on October 6, 2003.

The denial was appealed to this Committee on September 26, 2003. On November 6, 2003, abutters James and Belinda Krawiecki moved to intervene pursuant to 760 CMR 30.04. The developer and the Board continued negotiations, and settled their differences by

entering into a "Stipulation Dated February 23, 2004" in settlement. That agreement provided for issuance of a comprehensive permit for the construction of 32 units of housing.¹ Stipulation ¶¶ 1-4 (filed Mar. 5, 2004). The abutters opposed the settlement, and on March 10, 2004, filed a "Motion... to Strike the Stipulation...."

In order to have as full a record before it as possible before ruling on the motion to intervene and the motion to strike, the Committee conducted a hearing and site visit on March 11, 2004. The developer participated pro se during the hearing. The abutters were represented by counsel, who attended the hearing and filed a memorandum on their behalf, but who no longer represents them. At the hearing, testimony was heard from the developer's principal, Stephen Burt, and from Mr. and Mrs. Krawiecki.

In the area where the housing is proposed, Greendale Avenue runs parallel to Route 128. Over a stretch of more than a quarter mile, there are only two houses on the northeast side, that is, between the street and Route 128. Tr. 95; Exh. 13. These are the house belonging to the Krawieckis and that of Vincent and Mary Boris. Tr. 52-56, 92; Exh. 13. They are on abutting parcels, separated by an ancient public way, Hardy Street. Tr. 57, 111. The Krawieckis own only the parcel that their house is located on, and do not own the land directly behind them, which extends between 400 and 500 feet to Route 128. Tr. 93, 112; Exh. 13. The Borises, on the other hand, own a much larger, 5.5-acre parcel, which extends to the southeast along Greendale Avenue and northeast all the way to Route 128. Tr. 52; Exh. 2, 13. The developer has an option to purchase that entire parcel from the Borises, who, under the development proposal, will continue to live in their house while five new detached,

1. Permission to build 24 units was granted outright, and an additional 8 units were approved based upon certain financial contingencies. For purposes of this order, the proposal must be considered to be 32 units. See Tr., 61-62.

single-family condominium units will be built along Greendale Avenue and twenty-six multiplex units will be built behind them, closer to Route 128. Tr. 52, 55; Exh. 2.

The Krawieckis may be permitted to intervene if they show that they “may be substantially and specifically affected by the proceedings.” 760 CMR 30.04(2).²

The primary concern raised by the Krawieckis is that noise levels at their home resulting from highway traffic are likely to increase when trees are removed on the development site. Even assuming that there is currently a serious noise problem in the Krawieckis’ home,³ it does not appear that noise attenuation from foliage, even in summer, is dramatic. Tr. 94, 116; Exh. 8, p.4. In addition, the development site is diagonally behind the Krawieckis’ house—the forested parkland immediately behind them, which is directly between them and Route 128, will remain. Tr. 112; Exh. 2. And finally, more fundamentally, since trees are not necessarily a permanent part of the landscape, and since the noise that the Krawieckis complain of is not caused by the proposed development itself, there is not a sufficient cause-and-effect relationship between the proposed development and the Krawieckis’ injury to support their request to intervene.⁴

2. Our discretion in this regard is broad. See *Tofias v. Energy Facilities Siting Board*, 435 Mass. 340, 346, 757 N.E.2d 1104, 1109 (2001).

3. Though Mrs. Krawiecki herself once measured an interior noise level of 58 decibels in her home, the reports of experts that were admitted into evidence relate to noise impacts on the *proposed* housing, which will be within 100 feet of the Route 128 right of way, and even they are far from conclusive. Tr. 97; Exh. 5, 8.

4. There are two other, more technical analytic approaches to the causality problem, both of which lead us to the same result. First, we could consider, as one factor, whether the harm here is greater than that which could result from a use of the property permissible as of right. See *Marashlian v. Zoning Board of Newburyport*, 421 Mass. 719, 724, 660 N.E.2d 369, 373 (1996). The harm does not appear to be greater. Second, since the town does not appear to regulate the cutting of trees on private property, permission to cut trees is not among the requests for relief from local requirements that are sought under the comprehensive permit here. See Tr. 102-103. Thus, it is by no means clear that whether or not trees should be cut to maintain a minimal noise buffer from the existing highway for the Krawieckis is an issue to be addressed within the comprehensive permit process. Under our

Finally, the Krawieckis raised a number of other concerns in addition to noise. They are concerned about motor vehicle traffic on Hardy Street. But the development plans show only a five-foot-wide footpath and developer has firmly reiterated his commitment not to provide vehicular access to the development via Hardy Street. Exh. 2; Exh. 3, ¶ 1; Tr. 57. They are concerned about pollution from the highway. Tr. 95-96. They are concerned about where the affordable units would be located. Tr. 104. They are concerned about a walking trail used by the public that parallels Route 128. Tr. 104-106. They are concerned about the loss of open space. Letter from J. and B. Krawiecki filed Apr. 27, 2004; Exh. 14. All of these, however, are general concerns of many residents of Needham, and are not specific to the Krawieckis, and thus do not support their motion for intervention.

For these reasons, the Motion to Intervene is denied.

Further, I have examined the Stipulation that formalizes the parties' settlement agreement (Exhibit 1, "Stipulation Dated February 23, 2004"), and find it satisfactory. The Motion to Strike the Stipulation is denied. Rather, I hereby approve the Stipulation, and it is incorporated into this Decision by reference. Specifically, the development plan that is approved is Exhibit 2 ("Definitive Housing Plan"), including "Housing Site Layout in the Town of Needham off of Greendale Avenue," August 7, 2003, by Needham Survey Associates, Inc. The Board is directed to issue a comprehensive permit in accordance with the Stipulation, and to take any further steps necessary to formalize the comprehensive permit for recording or other purposes. If the Board fails to act within thirty days of this decision,

regulations, we are to consider "only those interests and concerns ... which are germane to the issues of... whether the proposal is consistent with local needs," that is, issues related to local requirements and regulations. 760 CMR 30.04(2); also see G.L. c. 40B §20 (definition of "consistent with local needs"). The noise issue raised by the Krawieckis is not sufficiently germane to local requirements to support intervention.

this decision shall be deemed, pursuant to G.L. c. 40B, § 23, to be a Comprehensive Permit issued by the Board.

No construction shall commence until detailed construction plans and specifications have received final approval pursuant to the procedures of the MassHousing Housing Starts program.

Housing Appeals Committee

A handwritten signature in dark ink, appearing to read 'W. Lohe', written over a horizontal line.

Werner Lohe, Chairman
Presiding Officer

Date: June 18, 2004

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